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TAN LEE CHOON

v.

LEE CHOOI HOO (NO 2)

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HIGH COURT MALAYA, KANGAR
ZAMANI A RAHIM JC
[WRIT NO: 22-14-2007]
25 NOVEMBER 2007

C ***CIVIL PROCEDURE:*** *Injunction - Erinford injunction - Application for - Facts and circumstances - Whether should be allowed*

The plaintiff herein applied for an Erinford injunction after his application for interlocutory injunction had been earlier dismissed by the court. The Erinford injunction is a form of prohibitory order restraining the defendant from dealing with the subject matter of the action. In the context of this case, the plaintiff had sought firstly to restrain the defendant from damaging any structure, building or Rumah Tokong (deity) and secondly to restrain the defendant from developing the land held under Grant 646, Lot 42, Section 2, Town of Kangar, Perlis ('the said land') into commercial lots pending appeal. The plaintiff had since filed a notice of appeal to the court of appeal. Pending the determination of the appeal, the plaintiff urged this court to grant the Erinford injunction to preserve the *status quo* – that no commercial development should be carried out by the defendant on the said land. According to the plaintiff, if the Erinford injunction was not granted and in the event the plaintiff was successful at the court of appeal, the appeal would become nugatory. The defendant submitted that the Erinford injunction should not be granted as (i) the plaintiff was not entitled to be granted the Erinford injunction; (ii) that if this court were to grant the Erinford injunction the effect would be similar to this court granting the injunction at the interlocutory stage and (iii) the plaintiff had withdrawn the affidavit in support of the application affirmed by one Tan Lee Choon on 24 September 2007. There was, therefore, no available grounds shown by the plaintiff that special circumstances peculiar to his case were established for this court to consider.

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Held: (dismissing Erinford injunction application):

(1) This court, being the court of first instance which heard the original application for injunction was well appraised with all the facts of the case. This court was in a good position to deal with this application which needed to be disposed off promptly. If formal application by way of summons in chambers was insisted upon, as did the defendant in this case, the element of promptness or urgency was defeated. Therefore, the oral application for the Erinford injunction may be made orally to the judge. (para 8)

(2) Further, this court did not agree with the defendant's submission that since the court had dismissed the interlocutory injunction, this court too ought to dismiss the application for Erinford injunction. Different questions are considered at the original application for injunction and at the subsequent application for injunction pending appeal. (para 10)

(3) However, looking at the facts and circumstances of the case herein, the defendant being a successful party at the original injunction stage ought not to be deprived from reaping the fruits of his success even pending the plaintiff's appeal. This was more so, as the defendant had patiently waited for six years for the development to take off the ground. The defendant too expended large sum of money to settle fees and to pay additional premiums to the relevant authorities. The defendant too incurred substantial preliminary construction costs. The question of damages in relation to the Rumah Tokong (deity) did not arise. The Rumah Tokong (deity) would not be destroyed or affected in any way by the defendant's construction activities. The Rumah Tokong (deity) would be preserved as it was. (para 13 & 14)

(4) As regard to the development of the said land, the defendant was financially sound to pay damages in the event the plaintiff succeeded. On the other hand, the same could not be true to the plaintiff. The plaintiff's undertaking as to damages was hollow and certainly unable to provide adequate damages in the event the defendant succeeded. (para 14)

Case(s) referred to:

Celcom (Malaysia) Bhd v. Inmiss Communication Sdn Bhd [2003] 3 CLJ 85 HC ***(refd)***

Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386 HC ***(dist)***

Erinford Properties Ltd v. Cheshire County Council [1974] 2 All ER 448 ***(refd)***

Ooi Meng Sua v. Aetna Universal Insurance Sdn Bhd [1995] 1 AMR 467 ***(refd)***

Sabah Medical Centre Sdn Bhd & Anor v. Hospitalia Activhealth (L) GMBH & Ors (No 2) [2007] 3 CLJ 171 HC ***(refd)***

Other source(s) referred to:

Malaysian High Court Practice, 1998 Desk Edition, vol 1, para 29.1.9

For the plaintiff - M Lavendran; M/s Ngeow & Tan
For the defendant - S Devandran; M/s Devandran & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Zamani A Rahim JC:

Erinford Injunction

[1] Having dismissed the interlocutory injunction on 24 August 2007, the plaintiff had applied for an Erinford Injunction. The Erinford Injunction is often used interchangeably with the term "Erinford Stay". The Erinford Injunction is a form of prohibitory order restraining the defendant from dealing with the subject matter of the action. In the context of this case, the plaintiff sought firstly, to restrain the defendant from destroying or damaging any structure, building or Rumah Tokong (deity) and secondly, to restrain the defendant from developing the land held under Grant 646, Lot 42 Section 2, Town of Kangar, Perlis (hereinafter referred to as "the said land") into commercial Lots pending appeal. The plaintiff had since filed notice of appeal to the Court of Appeal.

[2] The rationale of the Erinford principle has been summarized by Vincent Ng Kim Khoay J in *Ooi Meng Sua v. Aetna Universal Insurance Sdn. Bhd.* [1995] 1 AMR 467 as follows:

The principle expounded in *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 448, which followed the preceding cases of Polini, Wilson and Orion Property Trust, could broadly be summaries this. Upon the rationale that:

(a) the court had not become *functus officio* so long as the order remained unperfected;

(b) judges must decide cases even if they are hesitant in their conclusions and no human being is infallible;

(c) any application for stay to prevent the successful party from reaping the fruits of his success pending the appeal could appropriately be made initially to the trial judge because he, of course, knows all about the case and can deal promptly with the application; and

(d) Order 55 r. 12 of the Rules of the High Court requiring any application for a stay (though not pertaining to this branch of stay) to be made to the trial judge in the first place; the court of first instance is undoubtedly clothed with concurrent jurisdiction with the appellate court to grant a stay of execution of that order pending determination of the appeal in order to preserve the subject-matter of the dispute (See also O. 45 r. 11 and O. 47 r. 1 of the Rules of the High Court 1980).

[3] His Lordship Vincent Ng Kim Khoay J went on to say at p. 478:

as an appeal does not operate as a stay of execution, and bearing in mind that a successful party ought not be prevented from reaping the fruits of his success pending the opponent's appeal, and the fact that the power of the High Court *vis-a-vis* leave to appeal has been removed, an Erinford stay should only be granted in exceptional cases, and based on the following factors:

a) whether the applicant, in his application, had shown special circumstances peculiar to his case,

b) the probability, based on facts and law, that the judgment or order may be reversed or varied;

c) whether the successful party ought to be free to act despite the pendency of an appeal;

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d) the comparative effects of granting or refusing a stay pending an appeal being such that it would be right to preserve the *status quo* pending appeal, and

e) that subject matter of the case, and whether damages are of suitable alternative.

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[4] The plaintiff had filed the application for the Erinford Injunction by way of summons in chambers in encl. 19 together with affidavit in support affirmed by Tan Lee Choon on 24 September 2007. The application was fixed for mention on 25 C October 2007 for the defendant to file affidavit in reply. However, on 1 October 2007 the plaintiff had written a letter informing this court that he was withdrawing the affidavit in support of this application affirmed by Tan Lee Choon on 24 September 2007. This course was taken to avoid from further filing the affidavits D and to expedite the matter herein. The plaintif's letter dated 1 October 2007 read as follow:

Dated 1 October, 2007.

Tuan/Puan,

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Per: Mahkamah Tinggi Kangar Writ No: 22-14-07
Tan Lee Choon
(Pengerusi Rumah Tokong Poh Aun Keong – Plaintif
Lee Chooi Hoo
(Pengerusi Persatuan Hokkien Perlis) – Defendan

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1. Kami dengan rendah diri merujuk kepada perkara di atas di mana kami mewakili pihak Plaintif.

2. Kami ingin memaklumkan kepada Mahkamah yang Mulia ini bahawa permohonan Plaintif untuk injunksi Erinford melalui Saman G Dalam Kamar bertarikh 24 haribulan September, 2007 (atas satu Sijil Perakuan Segera) telah ditetapkan untuk Bicara pada 27 haribulan September, 2007.

3. Kami telah dimaklumkan oleh peguam kami yang mengendalikan tindakan ini, Encik Muzamir Mokhtar bahawa pada 27/09/2007, H peguamcara Defendan telah memohon satu penangguhan perbicaraan injunksi Erinford tersebut atas alasan bahawa Defendan perlu memfailkan affidavit balasan. Mahkamah yang Mulia ini telah membenarkan permohonan Defendan untuk penangguhan dan menetapkan perkara ini untuk Sebutan pada 25 haribulan Oktober, I 2007.

4. Kami dengan rendah diri ingin memaklumkan kepada Mahkamah yang Mulia ini bahawa kami ingin menarik balik Afidavit Tan Lee Choon yang diikrarkan pada 24 haribulan September 2007, yang difailkan sebagai sokongan permohonan untuk injunksi Erinford tersebut sebaliknya bergantung ke atas Afidavit Sokongan Tan Lee Choon yang diikrarkan pada 13 haribulan Ogos, 2007. Ini adalah untuk menjimatkan masa Mahkamah yang Mulia ini dan juga supaya tiada lagi affidavit perlu difailkan oleh kedua-dua pihak.

5. Kami juga ingin memaklumkan kepada Mahkamah yang Mulia ini bahawa peguamcara kami hanya akan membuat hujahan secara lisan ke atas perkara undang-undang semasa pendengaran permohonan injunksi Erinford tersebut dan hujahan peguamcara kami tidak akan melebihi sepuluh (10) minit.

6. Oleh yang demikian, kami dengan rendah diri memohon kepada budibicara Mahkamah yang Mulia ini untuk menetapkan satu tarikh bicara yang lebih awal (sebelum 25/10/2007) untuk pendengaran permohonan injunksi Erinford tersebut dan supaya tarikh sebutan pada 25 haribulan Oktober, 2007 dilapangkan.

7. Kami dengan rendah diri memohon kerjasama dari pihak Mahkamah dalam perkara ini dan seterusnya memohon maaf ke atas segala kesulitan yang diksebabkan oleh permintaan kami di sini.

Sekian, terima kasih.

Yang benar,

t.t.
bagi pihak Tetuan Ngeow & Tan.

[5] The plaintiff's counsel had proposed to proceed with an oral application instead and wished to rely on an earlier affidavit of Tan Lee Choon affirmed on 13 August 2007 in support of the original application for the interlocutory injunction to which I have already dismissed. This court, therefore, notified the parties that the mention date on 25 October 2007 was to be treated as the hearing application of the Erinford Injunction. This is the hearing.

[6] At the hearing, the plaintiff's counsel submitted that the appeal had been filed to the Court of Appeal appealing against my dismissal of the plaintiff's application for interlocutory injunction in encl. 4.

[7] Pending the determination of the appeal, the plaintiff's counsel urged this court to grant the Erinford Injunction to preserve the *status quo*. In this case, the *status quo* was that no commercial development should be carried out by the defendant on the said land. If the Erinford Injunction was not granted and in the event the plaintiff was successful at the Court of Appeal, the appeal would become nugatory. To support his submission, the plaintiff cited two authorities namely, 1) *Sabah Medical Centre Sdn. Bhd & Anor v. Hospitalia Activhealth (L) GMBH & Ors (No. 2)* [2007] 3 CLJ 171. and 2*) Celcom (Malaysia) Bhd v. Inmiss Communication Sdn. Bhd* [2003] 3 CLJ 85.

[8] In reply, the defendant's counsel contended that the plaintiff was not entitled to be granted the Erinford Injunction as the plaintiff's application in encl. 19 had yet to be heard and decided by this court. What this court had decided thus far was the dismissal of the plaintiff's application for interlocutory injunction. The defendant's counsel insisted that the application should be filed for the Erinford Stay. The defendant's argument is, of course, without merit. Though the plaintiff's counsel had withdrawn the affidavit of Tan Lee Choon affirmed on 24 September 2007 in support of the application herein, the plaintiff's counsel nevertheless intended to proceed with the oral application before this court. This court, being the court of first instance which heard the original application for injunction was well appraised with all the facts of the case. This court is in a good position to deal with this application which needs to be disposed off promptly. There is always an element of urgency in application of this nature. If formal application by way of summons in chambers is insisted upon, as did the defendant in this case, the element of promptness or urgency is defeated. Therefore, I am of the view that oral application for the Erinford Injunction may be made orally to the trial judge. My view is supported by the *Malaysian High Court Practice,* 1998 Desk Edition, vol. 1 at para. 29.1.9. It says:

> The application is made *ex parte*: *Erinford Properties Ltd v. Cheshire County Council*. The application may be made orally at the instant when the original application for injunction is dismissed ...

[9] The defendant's counsel also submitted that if this court were to grant the Erinford Injunction the effect would be similar to my granting the injunction at the interlocutory stage which in fact I have dismissed it. In support of his proposition, the

defendant had relied on a passage by Shankar J in *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386 which had dismissed both the injunction and injunction pending appeal. His Lordship said as follows:

> After my order Mr Palasuntharam gave notice of appeal and asked for an Erinford injunction, ie, an injunction pending an appeal against my decision: see *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 448. In view of the grounds on which I set aside the *ex parte* injunction, I did not think this a proper case to substitute with an injunction *inter partes* pending appeal. A stay of execution would have had the same result and I refused this also.

[10] If the defendant's counsel submission is taken to mean that – as I have dismissed the interlocutory injunction, as night follow the day; I too, ought to dismiss the application for Erinford Injunction, is erroneous. The above passage by Shankar J was made under a different set of facts and circumstances. I do not subscribe to the defendant's submission on this point. Different questions are considered at the original application for injunction and at the subsequent application for injunction pending appeal. To support this view, I can do no better than to cite what was said by Zulkefli Ahmad Makinuddin J (as he then was) in *Celcom (Malaysia) Bhd v. Inmiss Communication Sdn Bhd* [2003] 3 CLJ 85.

> The consideration for the granting of the Erinford injunction is different from the consideration under application in encl. (3) and there is nothing inconsistent for me to grant the prayers under encl. (22) notwithstanding the decision dismissing encl. (3). For this proposition I would like to refer to the case of *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 448 wherein his Lordship Megarry J had stated most succinctly the basis for such jurisdiction to grant an injunction pending appeal at p. 454 as follows:
>
> > I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the

> judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the *status quo* pending the appeal. I cannot see that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction or that by refusing an injunction pending the trial the judge becomes *functus officio quoad* granting any injunction at all.

[11] The principle enunciated in the above passage was followed and applied by Zulkefli Ahmad Makinuddin J in *Celcom (Malaysia) Bhd v. Inmiss Communication Sdn. Bhd (supra)*. There the plaintiff's application for the interlocutory injunction was refused but the plaintiff's subsequently obtained the Erinford Injunction pending their appeal against the said refusal.

[12] The defendant counsel further submitted that the Erinford Injunction should not be granted as the plaintiff had withdrawn the affidavit in support of the application affirmed by Tan Lee Choon on 24 September 2007. There was, therefore, no available grounds shown by the plaintiff that special circumstances peculiar to his case were established for this court to consider.

[13] The defendant being a successful party at the original injunction stage ought not to be deprived from reaping the fruits of his success even pending the plaintiff's appeal. This was more so, as the defendant had patiently waited for about six years for the development to take off the ground. The defendant too expended large sums of money to settle fees and to pay additional premiums to the relevant authorities. The defendant too incurred substantial preliminary construction costs.

[14] The question of damages in relation to the Rumah Tokong (deity) did not arise. The Rumah Tokong (deity) would not be destroyed or affected in any way by the defendant's construction activities. The defendant had repeatedly averred that he was not going to remove, damage or destroy it. The Rumah Tokong (deity) would be preserved as it was. As regards to the development of the said land, the defendant was financially sound to pay damages in the event the plaintiff succeeds. On the other hand, the same could not be true to the plaintiff. The plaintiff's undertaking as to damages was hollow and certainly unable to provide adequate damages in the event the defendant succeeds. The plaintiff's main source of income was merely from donations from Hokkien Chinese community.

[15] Based on the grounds stated above, and in the exercise of my discretion, I too, dismissed the application for the Erinford Injunction with costs.